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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-177

FRED G. BURKE, Commissioner of Education of the State of New Jersey, as Commissioner and Individually; RUTH H. MANCUSO, President of the New Jersey State Board of Education, as President and Individually; and the NEW JERSEY STATE BOARD OF EDUCATION,

Petitioners,

v.

NEW JERSEY EDUCATION ASSOCIATION; PATERSON EDUCATION ASSOCIATION; CAMDEN EDUCATION ASSOCIATION; EDUCATION ASSOCIATION OF PASSAIC; NEWARK TEACHERS ASSOCIATION; WEST NEW YORK EDUCATION ASSOCIATION; UNION CITY EDUCATION ASSOCIATION, New Jersey Corporations; JOSE YI; and MANNY DEPARA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

Jurisdiction

The jurisditional requisites are adequately set forth in the Petition.

Questions Presented

1. Whether the *Younger* v. *Harris* abstention doctrine, which this Court has determined is not limited in application to pending state criminal or quasi-criminal proceedings in *Juidice* v. *Vail,* is applicable when there is pending a prior state civil proceeding, initiated by the federal plaintiffs, in the form of an appellate proceeding to review administrative rulemaking, which involves some, but not all federal claims raised in the subsequent federal suit?

2. Whether this Court's decision in *England* v. *Louisiana State Bd. of Medical Examiners* precludes a federal litigant who has, without making an explicit reservation on the State record raised some of his federal claims in the state court and who has not sought review in this Court of the untavorable state decision, from litigating federal claims in the federal district court which were not fully and freely litigated in the state proceeding?

3. Does the doctrine of res judicata bar a federal plaintiff in a suit under 42 U.S.C. §1983 from litigating federal issues which were not, but could have been, raised in a simultaneously pending state proceeding initiated by the federal plaintiff which has not yet resulted in a final judgment?

Statement of the Case

The Respondents accept the Statement of the Case set forth in the Petition except insofar as it is supplemented, clarified, or corrected below.

The procedural background of this case commenced with the filing of a Notice of Appeal by Respondents Yi and

DePara with the Appellate Division of the Superior Court of New Jersey, on October 14, 1976, from amendments to administrative regulations of the New Jersey State Board of Education relating to the certification of Bilingual and Bicultural teachers and teachers of English as a second language. N.J.A.C. 6:11-8.8 and 8.9 (App. I). The amendments sought to be reviewed were promulgated effective September 15, 1976. Id. This appeal was instituted pursuant to N.J. Court Rule 2:2-3(a)(2) which provides that challenges to the final actions of state administrative agencies shall be by way of appeal as of right in the Superior Court, Appellate Division.

The three applications for a stay of the implementation of the challenged regulations mentioned in the Petition were separate and distinct only in a strictly arithmetic sense. The first two of these were made simultaneously on October 13, 1976, the same day the Notice of Appeal was forwarded for filing pursuant to N.J. Court Rule 2:5-1(e). One of these was a motion for a stay of the regulations addressed to the Appellate Division pursuant to N.J. Court Rule 2:9-7. (See App. D). The other was an application addressed to a single judge of the Appellate Division for a stay pending disposition of the motion by a full panel of the Appellate Division pursuant to N.J. Court Rule 2:9-8 (see App. C). The latter application to a single judge was denied on the same day it was made (App. C). The motion for a stay addressed to the Appellate Division as a whole was denied without prejudice to its resubmission on November 17, 1976, for failure to comply with the requirement that such motions be accompanied by supporting briefs, set forth in N.J. Court Rule 2:8-1 (App. D). This motion was resubmitted on April 14, 1977, after the appellants' brief on the merits had been filed on March 28, 1977, and was granted in part on April 25, 1977 (App. E).

The record on the appeal, certified and filed by the State Board of Education itself on or about November 12, 1976, pursuant to N.J. Court Rule 2:5-4(b), consisted of the regulations at issue as amended, a four-page internal State Department of Education memorandum, a four-page document entitled "Rationale for Equivalency of Experience Amendments to the Bilinqual/Bicultural and ESL Certification Regulations," and a one-page directive of the State Board of Education regarding the development of the challenged regulations (see App. II). Although supplementation of the record is possible on such an appeal pursuant to N.J. Court Rule 2:5-5(b), such supplementation is at the discretion of the Appellate Division and is available only by way of the Court's order, upon its motion or that of a party.

No factual or legal grounds for the appeal were specified in the Notice of Appeal (App. I) as implied by Respondents, the contents of which Notice were dictated by N.J. Court Rule 2:5-1(f). Indeed, the issues on the appeal were not specified until the filing of the appellants' brief on March 28, 1977. See N.J. Court Rule 2:6-2. Raised in that brief were the state law grounds of estoppel and failure of compliance with the New Jersey Administrative Procedure Act (N.J.S.A. 52:14B-1, et seq.) with regard to the promulgation of the regulations as well as federal procedural due process and equal protection issues (see App. F). The decision of the Appellate Division, isued on July 12, 1977, devoted exactly one paragraph to appellants' constitutional claims (App. F).

ARGUMENT

I

Certiorari should be denied because the *Younger* v. *Harris* doctrine is clearly inapplicable to this case.

The relationship between this case and the abstention doctrine set forth in *Younger* v. *Harris,* 401 U.S. 37 (1971), and amplified in *Huffman* v. *Pursue Ltd.,* 420 U.S. 592 (1975), *Juidice* v. *Vail,* 430 U.S. 327 (1977) and *Trainor* v. *Hernandez,* 431 U.S. 434 (1977), is so remote it approaches nonexistence. No amount of complaining by the Petitioners can change that plain fact.

First of all, no affirmative state enforcement of any important state interest was involved in the appeal pending in the New Jersey courts when the federal action was filed here. See *Trainor* v. *Hernandez,* supra. Indeed, like the situations in *Huffman, Juidice* and *Trainor,* the pending state action was an appeal (not a "suit") initiated by the federal plaintiffs, (Respondents here) themselves. The appeal was instituted to review a rulemaking action of the Petitioners who were obliged to defend it. Hence, no affirmative vindication of any important state interest was at all at work in that appeal. In fact, it is obvious that the state appeal need not have been pursued at all in order for the appellants there, as federal litigants, to have successfully invoked the District Court's jurisdiction pursuant to 42 U.S.C. §1983. *Monroe* v. *Pape,* 365 U.S. 167, 183 (1961); cf. *England* v. *Louisiana State Bd. of Medical Examiners,* 375 U.S. 411 (1964); *Atlantic Coast Line R. Co.* v. *Brotherhood of Loc. Engineers,* 398 U.S. 281 (1970). The only substantial question in this case therefore involves "election of judicial fora" by the federal plaintiffs who

were simultaneously state appellants, rather than potential interference with the state's enforcement of its legitimate policies in the state judiciary. *Ellis* v. *Dyson,* 421 U.S. 426, 443 n.9 (1975) (Powell, J., dissenting).

The existence of this option on the part of the Respondents renders this case much more similar to *Gerstein* v. *Pugh,* 420 U.S. 103 (1975). There, the federal plaintiffs were state criminal defendants who obtained injunctive relief against pretrial dentention without a prompt hearing. The issues of the legality of such detention were not available to the plaintiffs by way of defense to the criminal prosecutions, but they clearly had the option, which they chose to forego, of a separate state civil action for declaratory and injunctive relief. Nonetheless, this Court found no *Younger* problem inherent in a federal injunction against such detention, the remedy opted for. Id. at 108 n. 9; see also *Lake Carriers Assoc.* v. *MacMullan,* 406 U.S. 498 (1972); *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971). Federal plaintiffs have never been required by this Court to exhaust state judicial remedies to vindicate federal constitutional claims as a prerequisite to raising those claims in a federal action under 42 U.S.C. §1983. See *Monroe* v. *Pape,* 365 U.S. 167 (1961). The mere fact that the Respondents chose the option of submitting some, but not all (see argument II, *infra*), of their federal claims in a state appeal, while simultaneously pursuing the federal action, should not deprive them of a federal forum under *Younger.* Such a result would render the timing of the filing of the state action determinative of the availability of a federal forum; for only recently in *Town of Lockport* v. *Citizens for Community Action,* 430 U.S. 259 (1977) this Court held the *Younger* doctrine inapplicable where a state suit was filed by federal plaintiffs *after* commencement of the federal action. See also

Steffel v. *Thompson,* 415 U.S. 452, 475 n. 22 (1974). Surely the state's interest in its laws relating to the type of government of its counties in *Lockport,* which was the subject of both suits there, is at least equal to that of the state here in regulating the qualifications of its teachers.

This state interest here was in fact totally unaffected by the federal action below. It will be recalled that the enforcement of the regulations at issue in both the state appeal and the federal suit was stayed as to those teachers ineligible for certification under them by the New Jersey Appellate Division pending disposition of the appeal by order dated April 25, 1977 (App. E). This determination had nothing whatsoever to do with the federal action. No injunction, preliminary or otherwise, was ever issued by the District Court against implementation of the challenged regulations. Thus, no disruption of state regulatory procedures was caused by the pendency of the federal action here. Quite simply there was no intervention by the federal court into the state regulatory scheme, but instead, by the state court itself. Under these circumstances, where the state regulatory process was unaffected, the principles of equity, comity and federalism underlying the *Younger* doctrine are not involved to any significant degree. See *Huffman* v. *Pursue Ltd.,* 420 U.S. 592, 604-605 (1975).

Nor does the mere fact that the state was here a party to both actions affect the above analysis. The state action was not an enforcement proceeding brought by the state "in its sovereign capacity" as in *Trainor* v. *Hernandez,* 431 U.S. 434, 446 (1977) and *Huffman* v. *Pursue Ltd.,* supra.

Moreover, the pendency of the federal suit here implicated no interference with the state court proceedings them-

selves. No injunction against the state proceeding was sought or granted as in *Juidice* v. *Vail,* 430 U.S. 327 (1977). Nor was there sought or granted any federal interference with the enforcement of any affirmative relief granted the state by the state court without exhaustion of state appellate remedies as in *Huffman,* and *Trainor.* See *Wooley* v. *Maynard,* 430 U.S. 705 (1977) (*Younger* does not apply where federal litigant who did not appeal past state convictions sought prospective relief against threatened future prosecution); cf. *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers,* 398 U.S. 281 (1970).

Similarly, the character of the federal litigation here, as limited by the decision of the Third Circuit Court of Appeals to federal claims not fully and freely litigated in the state appeal (App. A at 27a-29a), did not import any foreclosure of the state court from considering the challenged regulations in light of the appellants' federal claims. See *Trainor* v. *Hernandez,* 431 U.S. at 445. On the contrary, the appellants' chief constitutional claims were in fact set forth in their brief to the Appellate Division, in accordance with *Government and Civic Employees Organizing Comm., C.I.O.* v. *Windsor,* 353 U.S. 364 (1957) as clarified in *England* v. *Louisiana State Bd. of Medical Examiners,* 375 U.S. 411 (1964). For this same reason, there did not inhere in the situation in this case, as tailored by the Court of Appeals to reflect what should have been done by the District Court instead of dismissal, any serious duplication of proceedings or any negative reflection at all on the state court's ability to adjudicate federal constitutional claims, within the limitations of New Jersey appellate procedure relating to the scope of review of administrative action. See *Huffman* v. *Pursue Ltd.,* 420 U.S. at 603-604. Indeed, at the time of the Court of Appeals' decision below reinstating Respondents' federal suit on May 3, 1978, all state proceedings, including exhaustion of appellate remedies, had been completed almost a year before (see App. G). See id., 420 U.S. at 608-609. There was, in fact no pending state proceeding at the time as in *Trainor* and *Juidice.*

Even if attention should more properly be focused upon the situation at the time of the District Court's dismissal of the federal action, there did not inhere in that situation, as we have demonstrated above, any of the factors identified by this Court as calling into play the *Younger* doctrine. At that time, the state and federal courts had concurrent jurisdiction to determine the claims, of the Respondents appropriately submitted to each, and neither court was free to prevent any of the parties from pursuing appropriate claims in both courts simultaneously. See *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers,* 398 U.S. 281, 295 (1970); *Vendo Co.* v. *Lektro-Vend Corp.,* 433 U.S. 623 (1977). In such a situation, equity, comity and federalism are more than satisfied by adherence to this Court's directions in *England* v. *Louisiana State Bd. of Medical Examiners,* 375 U.S. 411 (1964), which is exactly what the Court of Appeals directed below (see App. A, at 21a-22a; 27a-29a). Simultaneous state and federal litigation by the same plaintiffs, involving separate issues pursuant to *England* avoids unnecessary duplication, involves no federal interference with state court proceedings, and does not prevent the state from providing a forum to determine both state and federal claims, hence entailing no negative reflection on the state courts. See *Huffman* v. *Pursue Ltd.,* 420 U.S. 592, 603-604 (1975).

The fact that the state is a party in both actions and that the subject matter thereof concerns state regulations in which the state is obviously interested does not vitiate this analysis. Mere federal judicial review of state executive action by a federal court, expressly authorized by Congress

in 42 U.S.C. §1983, has never been thought to offend equitable principles of comity and federalism. Cf. *Mitchum* v. *Foster,* 407 U.S. 225 (1972). The state always has a recognizable interest in its official functions. But the final arbiter of the constitutional legitimacy of the execution of those functions is the judiciary, and, according to express Congressional intent, the federal judiciary. Id. Thus, the mere fact that a preliminary stay of the effect of the regulations was sought in the District Court here entailed no disruption of the state functions involved, either executive or judicial. Such a stay was first sought in the state courts and denied on procedural grounds rather than on the merits, and only once, not twice are represented by petitioners. Moreover, the District Court never seriously considered temporary injunction of the enforcement of the regulations at issue, even though counsel for Respondents indicated willingness to withdraw the state appeal entirely to avoid dismissal of the federal action (see App. B).

Verbal exaggeration of the amount of time and energy expended in the state proceeding cannot change the fact that it was merely an appeal from administrative rulemaking to an appellate court, bearing no resemblance at all to a trial. See *Huffman* v. *Pursue Ltd.,* 420 U.S. 592, 608-609 (1975). The only discovery involved was that voluntarily accorded by the State Board of Education in establishing the record on appeal. See N.J. Court Rule 2:5-4(b). That record consisted entirely of nine pages of documents (see App. II). No testimony was ever taken, and all determinations during the pendency of the appeal were made pursuant to the filing of appropriate papers without any hearing, except for oral argument of the merits of the appeal (see App. F). Simply put, the state appeal presented the federal court with almost nothing to duplicate, even without limitation of the issues pursuant to *England.*

No disrespect for the state appellate court's ability to deal with federal constitutional issues is reflected in merely recognizing the limitations inherent in New Jersey Appellate procedure relating to the review of administrative action. The scant record described above (see App. II) could not have been readily supplemented by the appellants except with material evidence already known to them. See N.J. Court Rule 2:5-5(b); cf. *In re Gastman,* 147 N.J. Super. 101, 370 A.2d 866 (App. Div. 1977). Moreover, no discovery procedure or procedure for the taking of testimony to supplement the record is available except under the above rule which allows, in the court's discretion and by its order, "the taking of additional evidence and the making of findings of fact thereon by the agency below, or, in exceptional instances, by a judge of the Superior or county court . . ." N.J. Court Rule 2:5-5(b).

The obviously limited opportunity provided by this rule for building a factual record is exacerbated by the fact that under New Jersey law, no hearing is generally required in administrative rulemaking proceedings in the first place (see *American Trial Lawyers Assoc.* v. *N.J. Supreme Court,* 126 N.J. Super. 577, 316 A.2d 19 (App. Div.), aff'd, 66 N.J. 258, 330 A.2d 350 (1974)), and even where a hearing requirement is statutorily imposed, the provision of a forum to the public to be heard suffices and no adjudicatory hearing is necessary. See *In re Matter of Public Hearings,* 142 N.J. Super. 136, 361 A.2d 30 (App. Div. 1976). The factual basis for the requirements imposed by administrative regulations is presumed without the necessity of fact finding by the agency. *Consolidation Coal Co.* v. *Kandle,* 105 N.J. Super. 104, 251 A.2d 295 (App. Div.), aff'd o.b., 54 N.J. 11, 252 A.2d 403 (1969).

Such procedural conditions, inherent in New Jersey administrative rulemaking and in the appellate review thereof can hardly be said to provide an adequate opportunity to vindicate constitutional claims in need of factual support. See *Trainor* v. *Hernandez,* 431 U.S. 434, 441 (1977). They certainly offer no adequate substitute for the "benefit of a federal trial court's role in constructing a record and making fact findings." *England* v. *Louisiana State Bd. of Medical Examiners,* 375 U.S. 411, 416 (1964). It should not be forgotten, as this Court also noted in *England,* that constitutional claims typically turn upon factual findings. Id. at 416-417 (quoting *Townsend* v. *Sain,* 372 U.S. 293, 312 (1963)). For all these reasons, it cannot be said that the state appeal adequately provided Respondents the opportunity of having their constitutional claims "fairly and fully" adjudicated in that proceeding. *Kugler* v. *Helfant,* 421 U.S. 117, 124 (1975); *Gibson* v. *Berryhill,* 411 U.S. 564, 577 (1973). In short, the primary prerequisite for the application of the *Younger* doctrine (see *Trainor, supra,* 431 U.S. at 441), was wholly absent in this case, not because of any lack of ability or sensitivity to constitutional claims on the part of the state appellate court, but simply because of the total lack of fact finding machinery in New Jersey's administrative rulemaking process and appellate procedures for the review thereof.

In sum, this case bears no resemblance whatsoever to any of the progeny of *Younger* v. *Harris* in the civil area in which this Court has progressively restated, refined and extended the *Younger* doctrine over the past few years. As we have demonstrated, none of the factors calling into play the principles of equity, comity and federalism underlying the *Younger* doctrine, which have been so recently and carefully elaborated by this Court, are present in this case, except the fact of the simultaneous maintenance of state and federal proceedings in each of which the state was a party. Indeed, what the Petitioners complain of here is the wholly proper respect paid by the Court of Appeals below to this Court's exhaustive adumbration of the factors implicating *Younger* abstention in the civil area by its refusal to enter uncharted waters in a case in which none of those factors is fairly and concretely identifiable.

It is true that the simultaneous maintenance of state and federal proceedings challenging state statutes or regulations is not unusual. Such a pattern is fairly mandated by the abstention doctrine of *Railroad Comm'n. of Texas* v. *Pullman,* 312 U.S. 496 (1941) and its progeny. The position advanced by the Petitioners would subject all private litigants who in good faith endeavor to settle state law issues in state courts to satisfy *Pullman* while maintaining federal actions, to almost certain *Younger* dismissal if any federal claims are raised in the state action. Indeed, under the facts of this case, this is the only position open to Petitioners, who are, plainly, merely seeking reversal of the Court of Appeals. Far from presenting an opportunity to "clarify" *Younger* abstention, the facts of this case promise only to further the confusion manifested by Petitioner's argument.

II

The decision below does not conflict with *England* v. *Louisiana State Bd. of Medical Examiners.*

In *England* v. *Louisiana State Bd. of Medical Examiners,* 375 U.S. 411 (1964), this Court reaffirmed the long standing principle that litigants who have properly invoked federal jurisdiction to consider federal claims ought

not to be compelled to accept a state determination of them. 375 U.S. at 415. The Court also recognized that litigants may elect to forego their right to a federal forum (375 U.S. at 412) and held that such a waiver occurs where "a party freely and without reservation submits his federal claims for decision by the state courts [and] litigates them there . . ." 375 U.S. at 419.

In the present case, Respondents desired to challenge new state regulations, in part on constitutional grounds. Recognizing the probability of *Pullman* abstention by the federal courts in the absence of an authoritative construction of the regulations, Respondents filed a Notice of Appeal in the New Jersey Superior Court, Appellate Division, as they were required to do within 45 days of the promulgation of the amendments to the regulations. N.J. Court Rule 2:4-1(b). Because of this time limit, Respondents could not wait to be relegated to a state forum by a federal court on *Pullman* grounds, without risking foreclosure of their opportunity to appeal to the state court.

Following the later filing of their federal action, Respondents were faced simultaneously with the requirement that they file their brief in the state appellate court and with a motion to dismiss the federal suit on both *Younger* and *Pullman* grounds. (See App. B). Respondents' state brief was filed on March 28, 1977, and their federal suit was dismissed in an oral opinion by the District Court on April 4, 1977.

Having been ejected from the federal forum at the behest of Petitioners, Respondents had no choice except to refrain from explicitly reserving on the state record their federal claims for later submission to the federal court. The state appellate court was at that time the only forum available to Respondents for the submission

of any claims, state of federal, with regard to the regulations at issue. Respondents had no way of predicting the outcome of their appeal from the District Court dismissal and thus, whether a federal forum would ever again become available to them.

Under these circumstances, to assert that the record shows the unequivocal and freely chosen litigation of federal claims by Respondents in the state appellate court is utterly absurd. And in any event, the Petitioners themselves admit the correctness of the Court of Appeals' determination that not all of the federal claims embodied in Respondents' federal complaint were submitted to the state appellate court (see App. A at 28a). The Court of Appeals, in remanding to the District Court for a determination as to whether the federal claims submitted in the state appeal were fully and freely litigated, merely recognized the obvious fact that under the circumstances outlined above, the resolution of that question presents difficult factual issues (App. A at 29a).

There was no inconsistency whatsoever between this determination and the pronouncements of this Court in *England,* supra. There, this Court set forth guidelines to be utilized by those litigants who, as here, are faced with *Pullman* abstention and the concomitant obligation to obtain an authoritative state court construction of state regulations in light of pertinent constitutional objections. See *Government and Civic Employees Organizing Comm., C.I.O.* v. *Windsor,* 353 U.S. 364 (1957). The Court deemed that the surest way to avoid the conclusion that federal claims submitted to the state court in satisfaction of *Windsor* were actually litigated was for the litigant to place an explicit reservation on

the state record such that "he is exposing his federal claims there only for the purpose of complying with *Windsor*." 375 U.S. at 421. The Court made it crystal clear, however, that such an explicit reservation is not absolutely necessary:

> *Such an explicit reservation is not indispensable*; the litigant is in no event to be denied his right to return to the District Court unless it clearly appears that he voluntarily did more than Windsor required and fully litigated his federal claims in the state courts.

375 U.S. at 421 (emphasis added and footnote omitted).

Thus, there is simply no inconsistency between the disposition of the Court of Appeals here in the absence of such an explicit reservation by Respondents and this Court's decision in *England*. *England* does not require such a reservation, but merely recognizes that its presence would make the federal determination of what was "voluntarily" and "fully" litigated in the state court much easier. The Petitioners' assertion that the Court of Appeals engaged in "interpretation" of *England* is patently ridiculous. The court merely read literally the plain language quoted above. No question worthy of this Court's attention inheres in that reading.

III

The holding of the Court of Appeals that where simultaneous state and federal actions upon the same subject matter are maintained pursuant to *England* v. *Louisiana State Bd. of Medical Examiners*, there is no bar to later federal litigation of constitutional claims not raised in the state court does not create a conflict among the circuit courts.

That a conflict exists among several of the Courts of Appeals upon the abstract *res judicata* issue projected in argument C. of the Petition is not denied. This fact was directly recognized by the Court of Appeals below (App. A at 22a-26a). But although the Court stated its holding on the point in terms of a choice of the rule that prior state judgments preclude later federal litigation only with respect to those constitutional issues actually litigated before and decided by the state courts, it is clear that the facts of this case render it an inappropriate vehicle to resolve the admitted conflict.

None of the cases cited by either the Petitioner or the Court of Appeals as espousing the opposite rule in cases involving 42 U.S.C. §1983 involved the maintenance of simultaneous state and federal actions because of *Pullman* abstention problems, except one, *Cornwell* v. *Ferguson*, 545 F.2d 1022 (5th Cir. 1977).* In *Cornwell*, as here, simultaneous state and federal actions were maintained. Id. at

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**Red Fox* v. *Red Fox*, 564 F.2d 361 (9th Cir. 1977) involved simultaneous actions but the federal action was under the Indian Civil Rights Act. In *Williams* v. *Washington*, 554 F.2d 369 (9th Cir. 1977), the determinative issue was whether the District Court had properly dismissed the federal action under the *Younger* doctrine. The Court of Appeals affirmed the District Court on this point.

1023. The District Court abstained pending termination of the state proceedings. Id. at 1023-1024. When the state proceedings were completed, including an appeal, the District Court dismissed the federal action. Id. at 1024. The Court of Appeals affirmed, holding specifically under *England* v. *Louisiana State Bd. of Medical Examiners* that all of the constitutional claims in the federal action has been "freely and without reservation" litigation in the state action and decided upon there. Id. at 1025. Thus, although the Court paid lip service to traditional *res judicata,* the ground of decision was actually the species of collateral estoppel adumbrated in *England.* The only genuine difference between *Cornwell* and the present case, then, is that the *England* factual issue of whether constitutional issues were fully and freely litigated was determined differently.

Hence, it is clear that this case hardly brings the *res judicata* issue into sharp focus. Whatever the justification for applying such a rule in §1983 cases where an unfavorable state judgment is rendered on the same cause before the federal action is instituted, the propriety of its application in cases covered by *England,* and in the face of the preclusion test there set forth by this Court requiring actual state litigation of the issues, is obviously doubtful. In other words, this case, which is of the latter type, has no factual counterpart among those cases cited in the Petition in which traditional *res judicata* principles were applied to preclude actions under 42 U.S.C. §1983. This case is, accordingly, a totally unsuitable vehicle for resolution of the conflict embodied in those cases.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the instant Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

GREENBERG & MELLK
Attorneys for Respondents
By: WILLIAM S. GREENBERG
A Member of the Firm

[APPENDICES FOLLOW]

APPENDIX I

Notice of Appeal to the Superior Court of New Jersey, Appellate Division Dated October 12, 1976

(Filed—October 14, 1976)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Civil Action

JOSE YI, MANNY DEPARA, Individually and as representatives of class comprised of all Bi-Lingual Bi-Cultural and English as a second language, Teachers of the State of New Jersey,

Plaintiff

v.

FRED G. BURKE, Commissioner of Education, and the Board of Education of the State of New Jersey,

Defendant.

PLEASE TAKE NOTICE that the Plaintiffs hereby give Notice that they will Appeal to the Superior Court of New Jersey, Appellate Division the following:

1. Amendments to N.J.A.C. 6:11-8.9 concerning the teaching of English as a second language said amendments having been adopted September 15, 1976.

Appendix I

2. Amendments to N.J.A.C. 6:11-8.9 concerning Bi-Lingual/Bi-Cultural Education adopted September 15, 1976. This Appeal is taken from the action of the Commissioner of Education and from the New Jersey State Board of Education to the Superior Court of New Jersey, Appellate Division.

The record of proceedings has been ordered by the undersigned as evidence by documents attached hereto and made part hereof, pursuant to RR 2:5-1 (f).

MICHAEL D'ALESSIO, JR.

Dated: October 12, 1976

APPENDIX I I

Statement of Items Comprising the Record on Appeal to the Superior Court of New Jersey, Appellate Division Dated November 12, 1976

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION—DOCKET NO. A-540-76

Civil Action

JOSE YI, MANNY DEPARA, Individually and as representatives of class comprised of all Bi-Lingual Bi-Cultural and English as a second language, teachers of the State of New Jersey,

Appellants,

v.

FRED G. BURKE, Commissioner of Education, and the Board of Education of the State of New Jersey,

Respondents.

To: CLERK OF THE COURT
MICHAEL D'ALESSIO, JR., ESQ.
19 Hutton Avenue
W. Orange, New Jersey 07052

SIRS:

PLEASE TAKE NOTICE that the State Board of Education hereby certifies and files pursuant to R. 2:5-4(b) the State-

Appendix II

ment of Items Comprising the Record on Appeal in the above case. The items comprising the record are as follows:

1. Amendments to N.J.A.C. 6:11-8.8 adopted by order of State Board of Education filed and effective September 15, 1976. R. 1976 d. 288.

2. Amendments to N.J.A.C. 6:11-8.9 adopted by order of State Board of Education, filed and effective September 15, 1976. R. 1976 d. 289.

3. Memorandum from Catherine Havrilesky to Dr. Fred G. Burke, dated June 23, 1976 reported of meeting held June 14, 1976 and meeting held June 21, 1976 which was attended by representatives of bilingual interest groups at invitation of Department of Education to discuss equivalency of experience for certification of teachers in bilingual/bicultural and English as a second language programs in New Jersey.

4. "Rationale for Equivalency of Experience Amendments to the Bilingual/Bicultural and ESL Certification Regulations" developed by representatives of bilingual interest groups convened at invitation of State Department of Education.

5. Directive of State Board of Education dated July 14, 1976 concerning development of guidelines for implementing certification regulations and directing evaluation of alternatives in establishing equivalency of experience in bi-

Appendix II

lingual/bicultural and English as a second language program in New Jersey.

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Respondents,
Commissioner and State
Board of Education
By: SUSAN P. GIFIS
Deputy Attorney General

DATED: November 12, 1976